

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS  
IN CLERKS OFFICE

CHARLES RANDLL HARRISON,

PETITIONER,

-VS-

WARDEN DAVID L. WINN,

RESPONDENT.

2007 JAN 31 A 11:46

CIVIL NO: 05-40021-MLW

U.S. DISTRICT COURT  
DISTRICT OF MASS.

CRIM. NO: 3:96-CR-57-RV

**MOTION TO SUPPLEMENT 28 U.S.C. SECTION 2241**

Rule 15(d) of the Federal Rules of Civil Procedures, permits "the party to submit a supplemental pleading setting forth transactions or occurrences, or events which have happened since the date of the pleading sought to be supplemented."

After the original filing of petitioner's § 2241 the Supreme Court decided the case of (John Cunningham -vs- California, No: 05-6551), where the court established that the statutory maximum for sentencing purposes was the jury's verdict as established by the Bright line Rule established by the Supreme Court in Apprendi, which was applied in Ring, Blakely, and Booker and now in Cunningham.

The petitioner in the instant pleading preserved and argued the Sixth Amendment violation of his jury trial right at his original sentencing on January 23, 1997, and raised the Apprendi issue at the evidentiary hearing that was ordered on June 5, 2001, as a result of a successful § 2255 challenge. See (exhibit A and B).

Petitioner was resentenced in 2001 as a result of his successful § 2255 motion. See (exhibit C).

Apprendi, said that "any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime--and thus the domain of the jury--by those who framed the Bill of Rights." The court in Cunningham went on to state: We have since reaffirmed the rule of Apprendi, applying it to facts subjecting a defendant to the death penalty." Ring -vs- Arizona, 536 U.S. 584, 602, 609 (2002): "facts permitting a sentence in the excess of the '<sup>Standard</sup>~~statement~~ range' under Washington's sentencing reform act." Blakely -vs- Washington, 542 U.S. 296, 304-305, (2004); and "facts triggering a sentence range elevation under the then mandatory Federal Sentencing Guidelines." United States -vs- Booker, 543 U.S. 220, 243-244 (2005). The Cunningham court stated: "Blakely and Booker bear most closely on the question presented in this case."

The Supreme Court in United States -vs- Johnson, 457 U.S. 537, 73 L.Ed.2d 202, 102 S.Ct. 2579 (1982); set forth the proper test in determining retrospective application of a case. "First, when a decision of this court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later case has not in fact altered that rule in any material way."

See e.g. *Dunaway -vs- New York*, 442 U.S. 200, 206, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979); (reviewing application of the rule in *Brown -vs- Illinois*, 442 U.S. 590, 45 L.Ed.2d 416, 95 S.Ct. 2254 (1975); *Spinelli -vs- United States*, 393 U.S. 410, 412, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969) (further explicating the principals of *Aguilar -vs- Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964).

Petitioner moves this Honorable Court to apply the Bright line Rule announced in Apprendi retroactively to his case. In petitioner's trial the jury made no specific findings relating to drug quantity and type. Petitioner was also enhanced by the judge by preponderance of the evidence 2 levels for being a supervisor or manager, 2 levels for obstruction of justice, 2 levels for firearm possession and for possessing and distributing 16.3 kilograms of methamphetamine all found by the judge after jury trial.

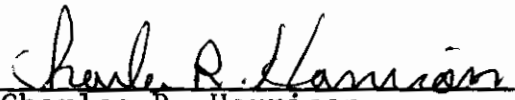
Petitioner was sentenced pursuant to the mandatory Federal Sentencing Guidelines, all in violation of Apprendi and Blakely.

Petitioner's jury verdict was a general verdict of an undetermined amount of methamphetamine. Petitioner's sentence according to the jury verdict, "less than 2.5 grams of methamphetamine or less than 500 miligrams of methamphetamine (actual) or less 500 miligrams Ice" which would be level (12) at 2D1.1 Federal Sentencing Guidelines at Category II would produce a sentence of 12-18 months. Petitioner is now serving his 12th year of incarceration.

CONCLUSION

There is no basis for this court not to apply the Rule first announced in Apprendi, reaffirmed in Ring reaffirmed in Blakely and reaffirmed in Cunningham to petitioner's case and grant him immediate release.

Respectfully submitted,

  
Charles R. Harrison  
09856-002 P-Unit  
FMC Devens  
P.O. Box 879  
Ayer, MA 01432-0879

CERTIFICATE OF SERVICES

I do certify that I did place in the hands of prison authorities one (1) copy of my supplemental pleading to his § 2241 to the below stated address to be placed in the U.S. Mail service:

Sabita Singh  
Assistant U.S. Attorney  
One Courthouse Way, Suite 9200  
Boston, MA 02210

Respectfully,

  
Charles R. Harrison

(Exhibit A)

1

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA

PENSACOLA DIVISION

UNITED STATES OF AMERICA

vs.

Case Number 3:96cr57

CHARLES RANDALL HARRISON,

Defendant.

SENTENCING

Before: Hon. Roger Vinson  
U.S. District Court  
Pensacola, Florida  
January 23, 1997

APPEARANCES: Mr. Edwin F. Knight  
Assistant United States Attorney  
Pensacola, Florida  
Appearing on behalf of the government.

Mr. Richard J. Spurlin  
Mr. Jackson W. Stokes  
Attorneys at Law  
Elba, Alabama  
Appearing on behalf of  
Charles Randall Harrison.

135

1 Owens was a charged coconspirator, he possessed guns during  
2 the course of the conspiracy. It's certainly reasonably  
3 foreseeable, given the amount of money that was involved and  
4 drugs that were involved, that firearms would be used during  
5 the course of the conspiracy.

6 THE COURT: Well, not only were they used but they  
7 were used and undoubtedly Mr. Harrison was fully aware they  
8 were being used even in the absence of any proof that he used  
9 them directly, personally. So that's certainly within the  
10 adjustment under the Otero guideline and under guideline  
11 2D1.1(b)(1), so that objection is overruled.

12 MR. SPURLIN: Then we just renew our factual  
13 objections as stated in the written objection, Your Honor.

14 THE COURT: Well, if you have an objection you want  
15 to preserve for appeal you need to bring it to my attention  
16 right now. The Eleventh Circuit's Jones procedure requires  
17 you to make sure all of these are clearly raised and are a  
18 matter of record, Mr. Spurlin, so I can't rule on it unless  
19 you bring it to my attention.

20 MR. SPURLIN: Well, I would say a global objection,  
21 and I know the guidelines provide otherwise. The defendant  
22 is going to object to use of any information outside the  
23 trial transcript because it is our position that that is  
24 violative of the Sixth Amendment guarantee to confront those  
25 witnesses against one. If the court can utilize any

1 material, any information outside a trial for the purposes of  
2 sentencing I respectfully submit there's not much use in a  
3 trial.

4 It's really within the purview of the finder of fact, the  
5 jury, to determine what the culpable conduct of the defendant  
6 was. And that culpable conduct as determined by the jury  
7 should be the sole source of sentencing.

8 THE COURT: Well, if it's relevant conduct, relevant  
9 conduct is expressly required to be included under the  
10 guidelines. And any relevant conduct, assuming it meets the  
11 preponderance of the evidence standard, can be considered.  
12 Overruled.

13 MR. SPURLIN: And I would object to the use of the  
14 drug methamphetamine in paragraph ten, eleven, twelve,  
15 thirteen, fourteen, fifteen, sixteen, seventeen, eighteen. I  
16 believe it also appears in nineteen, twenty, twenty-one,  
17 twenty-two, twenty-three and twenty-four.

18 THE COURT: All right, that objection is overruled.  
19 There's overwhelming evidence that it was methamphetamine.  
20 There may be a question about whether this is methamphetamine  
21 L or methamphetamine D. Mr. Knight, do you want to be heard  
22 on that?

23 MR. KNIGHT: Your Honor, I don't think that the  
24 laboratory analysis determined whether it was L or D. I'm  
25 not sure under the guidelines whether it--

(Exhibit B)

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION

UNITED STATES OF AMERICA

vs.

Case No. 3:96cr57/RV

ROBERT HENLEY AND  
CHARLES HARRISON,

Defendants.

---

Transcript of Evidentiary Hearing  
held in the above-styled cause before the Honorable Miles  
Davis, Magistrate Judge, on the 5th day of June, 2001,  
commencing at 1:32 p.m. at One North Palafox Street,  
Pensacola, Florida.

DESIRAE S. JURA, RPR, CSR  
Official Court Reporter  
P. O. Box 1624  
Pensacola, Florida 32597  
(850) 433-9292

1                               --oOo--

2                   THE COURT: Good afternoon, everyone. We are  
3 here for an evidentiary hearing on Mr. Harrison and Mr.  
4 Henley's cases. It looks like we have a procedural  
5 preliminary matter to take up, and that's Mr. Harrison's  
6 motion to allow him to represent himself. Mr. Kypreos, have  
7 you seen this?

8                   MR. KYPREOS: No, sir.

9                   THE DEFENDANT: Could I speak, Your Honor?

10                  THE COURT: Mr. Harrison, stand up and tell me  
11 why you don't want a lawyer.

12                  THE DEFENDANT: Well, I had all my legal stuff  
13 and all that I brought with me to represent myself, but it  
14 was lost in transit. So, I'm not prepared to argue my case.  
15 I will have to depend on counsel.

16                  THE COURT: You wish to withdraw your motion to  
17 allow movant to represent himself?

18                  MR. KYPREOS: Yes, sir.

19                  THE COURT: All right. I will allow you to  
20 withdraw that motion. The motion will be denied as  
21 withdrawn.

22                  THE DEFENDANT: Thank you.

23                  THE COURT: We need also to discuss the issue  
24 with the applicability of the Apprendi decision, because we  
25 had left that -- or, I had left that open as a matter that

1 might be considered. The government has filed a  
2 supplemental memorandum on the issue.

3 Mr. Kypreos, Mr. Jackson, the issue is whether we  
4 are going to take any evidence this afternoon on matters  
5 raised in the -- what's called the Apprendi issue. And  
6 before I decide that, I need to decide whether we are going  
7 to apply it retroactively. Does either counsel wish to be  
8 heard on that?

9 MR. JACKSON: Judge, this was just handed to me  
10 and probably to Mr. Kypreos, also. But I do note that the  
11 Eleventh Circuit Court only found that Apprendi didn't apply  
12 retroactively and, second, for successive sections of 2255.  
13 This is an initial 2255 proceeding on behalf of Mr. Henley.

14 Based on that, based on the importance that  
15 Apprendi applies, I would request that the Court follow the  
16 law as it currently exists in the Eleventh Circuit, and go  
17 ahead and allow the argument on Apprendi. If -- of course,  
18 if the Court is wrong, I'm sure that the matter will be  
19 taken up with the Eleventh Circuit and they will make the  
20 ruling on it expeditiously. But our position is that the  
21 Court ought to hear the argument on Apprendi at this point  
22 because its significant impact -- I went and copied  
23 Apprendi, and the Court is well aware that the case is that  
24 thick.

25 And that would be our position on this, Judge.

1 Go ahead and follow the status of the law in the Eleventh  
2 Circuit as it exists -- or, I guess, the ambiguity in the  
3 law at this particular point, and go ahead and allow the  
4 argument Apprendi.

5 THE COURT: Mr. Kypreos.

6 MR. KYPREOS: Your Honor, I must admit, I really  
7 wasn't quite certain, from the order that you had entered  
8 previously, precisely what we would be addressing as to  
9 Apprendi. In other words, as I read the order, it was  
10 basically counsel would be appointed with respect to  
11 evidentiary issues, and that essentially we were going to  
12 have an evidentiary hearing today. And it wasn't clear to  
13 me whether or not we would be debating whether or not it was  
14 retroactively applicable or not, although I didn't look into  
15 that subject.

16 I guess my major disadvantage at this point is  
17 having received a supplemental memorandum from the  
18 government just today that cites about 39 cases, I can  
19 assure you, I haven't read those 39 cases and I'm not  
20 prepared to discuss that issue intelligently.

21 I had taken the order in the context, though,  
22 that apparently the defendant, after filing his motion,  
23 sought to have it amended, and apparently there was a hiatus  
24 there for a while as to whether or not he could amend it and  
25 whether or not Apprendi would be applicable. And then I

believe the Court entered an order permitting him to amend it and raise the issue. And then, at least from the pleadings I had up to this stage, I didn't determine that there was an issue as to its retroactive applicability. Obviously, in light of the government's memorandum, at this time there will be that issue.

With respect to that issue, I think I can only make the following comments based on what I know at this time, and I would like time to respond. If we could have an extension of time to at least do a memorandum of law, if that's what you wish of us. Again, I was confused. I thought we were just doing evidentiary issues.

THE COURT: Well, let me stop you there, Mr. Kypreos. The order was worded in the way that it was because the defendants are movants in this case and asked -- or at least Mr. Harrison had, and Mr. Henley had as well -- to raise the Apprendi issue; the Apprendi decision came down from the Supreme Court, and it involved issues that may be relevant to this case.

MR. KYPREOS: Right.

THE COURT: And the issue of whether it's applicable has been somewhat up in the air, although I have to tell you, in decisions that I have rendered in the last six months or so, we have determined that it is not applicable and wouldn't be applicable in a case of this

1 nature. I put that in there just in case something changed  
2 in the meantime, so I have to -- I left that in there so  
3 that if something changed and it became appropriate today to  
4 take evidence on the Apprendi issue, if it can be phrased in  
5 that manner, then we can do it today, but the government  
6 didn't have to give me its memorandum to convince me that  
7 it's not applicable, because I had already ruled that in.  
8 But I left it open for that reason.

9 MR. KYPREOS: And it was my understanding in the  
10 sense the defendant had made his argument and his motion. I  
11 would just like to make two comments on that particular  
12 issue, if I may. I realize you have a viewpoint on this,  
13 and --

14 THE COURT: Not a viewpoint. I have ruled on  
15 this on other cases similar to this one.

16 MR. KYPREOS: Yes, sir. But what I would like  
17 for you to consider is, first of all, it seems to me that  
18 there is a central question that has to be addressed in  
19 terms of its retroactive applicability. The first question,  
20 as I understand, is -- looking at the government's  
21 memorandum very briefly, is whether or not we have a  
22 watershed constitutional issue here, or is it basically some  
issue in procedure. I think yet another issue is --

looking at Apprendi is -- well, first as to

/ /

1 the defendant's essentially argued in his memorandum. But  
2 something else that the defendant said in his memorandum  
3 that caught my attention, Your Honor, was that if you look  
4 at his amended complaint, and you look at page 4 of his  
5 amended complaint, he said: The Supreme Court in Apprendi  
6 has now established a constitutional grill that which the  
7 Court in Jones suggested by way of footnote. As a result,  
8 in a federal statute where the quantity or type of drug  
9 constitutes a factor which might increase the maximum  
10 statutory penalty for an offense, then the quantity or type  
11 of drug constitutes an element of such an offense is now  
12 made clear by Apprendi and Jones. In such a situation, the  
13 quantity or type of drug must be charged in the indictment,  
14 submitted to the jury, and proven beyond a reasonable doubt.

15 Now, you know, as I understand it, we also have  
16 the Jones decision of which Apprendi was an extension. And,  
17 as I understand the defendant's argument, is what he is  
18 saying is, is that essentially, you know, they have made  
19 clear in Jones and Apprendi that this is not just a  
20 procedural rule, but it's a fundamental constitutional  
21 principal.

22 Now, there is one case I'm going to bring to your  
23 attention to you that supports the government's position as  
24 far as the retroactive applicability, but -- the case is  
25 United States versus Shawn Lamar Sanders. I may be

(Exhibit C)

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION

UNITED STATES OF AMERICA

vs.

CASE NO.: 3:96cr57/RV ✓

3:00cv35/RV/MD

CHARLES RANDALL HARRISON

09856-002

ORDER

This cause comes on for consideration upon the magistrate judge's report and recommendation dated July 9, 2001. The petitioner previously has been furnished a copy of the report and recommendation and has been afforded an opportunity to file objections pursuant to Title 28, United States Code, Section 636(b)(1), and I have made a de novo determination of those portions to which an objection has been made.

Having considered the report and recommendation and all objections thereto timely filed by the parties, I have determined that the report and recommendation should be adopted.

Accordingly, it is now ORDERED as follows:

1. The magistrate judge's report and recommendation is adopted and incorporated by reference in this order.

2. The motion to vacate, set aside, or correct sentence (doc. 172) and the motion for modification and correction of sentence (doc. 213) is granted in part and denied in part as set forth in the magistrate judge's report and recommendation.

ENTERED ON DOCKET 9/27/01 BY MLW  
(Rules 53 & 73 (a) FRCP or 32 (d) (1) & 55 FRCP)

Copies sent to: Knight Harrison, MD,  
USM, USPO

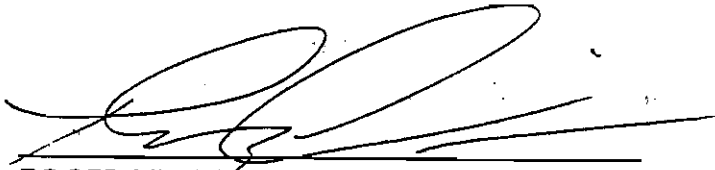
OFFICE OF CLERK  
U.S. DISTRICT CT.  
NORTHERN DIST. FLA.  
PENSACOLA, FLA.

01 SEP 27 AM 8:28

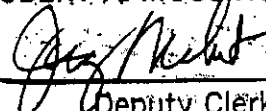
250

dated July 9, 2001. Petitioner is hereby resentenced to a term of 360 months imprisonment on Count 1. In all other respects, the petitioner's sentence remains in full force and effect.

DONE AND ORDERED this 27<sup>th</sup> day of September, 2001.

  
\_\_\_\_\_  
ROGER VINSON  
CHIEF JUDGE

**CERTIFIED A TRUE COPY**  
ROBERT A. MOSSING, CLERK

By   
Deputy Clerk

Date: 10-1-01  
Telephone #: 850-435-410  
Name & Title of Person Contacted:  
For Verification: Deputy Clerk  
Staff Signature: Robert A. Mossing, Clerk